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[ORIGINAL CIVIL JURISDICTION]
TERRELL. J.
May 16, 1938.

GAN GUAN KIAT v. G. H. KIAT.

[SINGAPORE ORIGINATING SUMMONS No. 59 of 1938]

Vendors & purchasers—sale of land by executor not altogether out of Court—procedure—service of summons on persons affected—protection of purchasers—R. S. C. O. 48 r. 2 (1) (a), O. 52 r. 1 (1) (f), Conveyancing & Law of Property Ordinance (Cap. 118) s. 75.

Semble, when an application for sale is made by an executor the procedure is regulated by O. 52 r. 1 (1) (f) and, in such a case, the persons to be served with the summons in the first instance shall be the persons or one of the persons whose rights or interests are so to be affected and persons beneficially interested in the estate of the deceased person are clearly affected by the order and one of them should be served and it may be open to any beneficiaries to apply to set the order aside.

The provisions of section 15 sub-section 2 of the Trustees Ordinance only apply where the money arises under a trust for sale of land and do not apply where a sale is carried out under the supervision of the Court. Moreover, when a sale is made under an order of court the purchaser is protected by section 75 of the Conveyancing and Law of Property Ordinance (Cap. 118) whether or not the purchaser has notice of any defect.

VENDOR AND PURCHASER SUMMONS.

K. I. Tan for the plaintiff.

Aditan for the defendant.

Cur. Ad. Vult.

TERRELL, J.—By an order dated the 1st April 1938 and made in Originating Summons 158 of 1928 "In the matter of the Estate of Chew Chin Kee deceased," a conditional contract between the plaintiff and the defendant was approved. The sale was ordered under the provisions of Order 48 r. 2 (1) (a) which enables a sale to be effected by laying proposals before the Judge in Chambers for his sanction. Such a sale is not a sale "by proceedings altogether out of Court," and accordingly there is no necessity for the order to be prefaced by a declaration that the Judge is satisfied that all the persons interested in the estate are before the Court or otherwise bound by the order as required by Order 48 r. 3. In fact there was no party before the Court other than the applicant, who was one of the executors and trustees and who applied *ex parte*. I would point out that the procedure, where an application for sale is made, is regulated by Order 52 r. 1 (1) (f) "the approval of any sale, purchase, compromise or other transaction," and Order 52 r.. 3 (a) (i) provides that in such a case the persons to be served with the summons in the first instance shall be "the persons or one of the persons whose right or interests are sought to be affected," and persons beneficially interested in the estate of Chew Chin Kee deceased are clearly affected by the order and one of them should have been served, and it may be open to any of the beneficiaries to apply to set the order aside.

The summons before me is a Vendor and Purchaser Summons, and the defendant the purchaser under the conditional contract, has taken the objection that the order of the 1st April 1938 provides *inter alia* that the plaintiff, as one of the executors and trustees of the will of Chew Chin Kee deceased, be authorised *inter alia* "to receive the purchase money and give a good discharge to the purchaser therefor." It is urged by the defendant that a sole trustee cannot give a good discharge in view of the provisions of section 15 (2) of the Trustees Ordinance (Cap. 59). Section 15 (1) of the Ordinance enables a trustee generally to give a good discharge to anyone paying any money and exonerates the person paying from seeing to the application thereof. Section 15 (2) reads as follows:—

> "This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for the proceeds of sale or other capital money arising under a trust for sale of land."

It was argued by the applicant that he was selling as executor and not as trustee, but I do not consider that this contention is sound. The testator died 18 years ago and all the testator's debts must have been paid long since. In fact the order of the 1st April 1938 shows that the proceeds of sale are to be devoted in part to repay the deficiency on a mortgage executed under an order of Court in 1930, ten years after the testator's death. This appears to me to be conclusive that the applicant is acting in his capacity as trustee and not as executor. The applicant further argues that even if he is selling as trustee in pursuance of an order of Court, section 15 (2) of the Trustees Ordinance does not apply. It will be seen that the provisions of this subsection only apply where the money arises under a "trust for sale of land." The object of the legislature was to protect the interests of persons entitled under a will or settlement and to prevent a sole trustee from diverting the moneys of which he was a trustee to improper purposes where the matter is not before the Court at all. The subsection appears to me to have no application where the sale is carried out under the supervision of the Court, and it may be presumed that the Court which authorises a sole trustee to give a receipt for the purchase money is satisfied that the interests of the beneficiaries will not suffer. The Court no doubt considered that sufficient protection would be given by the order that the balance of the proceeds of sale, after porviding for certain specific allocations, was to be paid into Court. In any case the purchaser is protected by section 75 of the Conveyancing and Law of Pro-

perty Ordinance (Cap. 118). This section reads as follows:—

> "75. (1) An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not."

This section is very wide, and applies whether or not the purchaser has notice of any defect. In my opinion this section would protect the purchaser even if subsequently an application should be made to set aside the order of the 1st April 1938 for want of parties.

In the result the purchaser's objection fails. The costs agreed at $30/- must be paid by the defendant to the plaintiff.

Judgment accordingly.

Solicitors for the plaintiff—*Chan & Eber.*

Solicitors for the defendent—*Aditan & Co.*

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

May 18, 1938.

IN RE LIM YEW TEOK, deceased

CHAN MEK TUAN v. LIM GEOK CHIP AND TWO OTHERS.

[SINGAPORE SUIT No. 500 of 1936].

Defaulting trustees—recovery by new trustees from shares of defaulting beneficiary—trustees of amounts due—apportionment between capital and income—position of foreclosed property and allocation of income.

A trustee who is indebted to the estate must be taken to have paid himself all that he can claim out of the moneys which had come into his hands and for which he has not accounted. Subsequent new trustees are entitled to retain the beneficial interest of such defaulting trustee until his default is made good. But this does not cause the interest of such defaulting trustee to become "vested in or payable to some other person" for the purpose of a forfeiture clause.

When there have been defalcations in respect of both capital and income and when sums are afterwards received to account of such defalcations, the amounts so received must be adjusted between capital and income and the manner in which adjustment should be made must necessarily vary according to the circumstances of the particular case. A court of equity should effect such adjustment in a manner that is reasonable and will so far as possible do justice between the tenant for life and the remaindermen. In this case the amounts recovered or to be recovered by the new trustees from or on account of the defaulting trustee from any source were directed to be allotted proportionately to capital and income according to the amounts of the defalcations of capital and income as found by the Registrar.

Held, also that when one of the trust securities is a mortgage which has been foreclosed the foreclosed property should be treated for the time being as a proper investment of the trust estate and the tenants for life should be entitled to the income therefrom. The arrears of mortgage interest prior to foreclosure having already been ascertained in the foreclosure proceedings, if before the period of distribution any of such foreclosed properties are sold under Order of Court then the amount realised can be apportioned between the tenants for life and the remaindermen on the same principle as would apply in cases where a mortgaged property is realised.

SUMMONS IN CHAMBERS.

Munro, for the applicants present trustees.

Vaux, for Lim Ah Kow appointed to represent certain classes of beneficiaries.

K. C. H. Lim, for Mr. C. F. J. Ess, Deputy Registrar, Supreme Court, Singapore, representing all persons interested in case the cesser clause should apply.

Green, for Mr. S. H. Cheah, Deputy Registrar, Supreme Court, Singapore, representing the remaindermen.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

TERRELL, J.—The first question that arises is whether the present trustees can retain the share of income payable to the defendants, the defaulting trustees, until the deficit in capital and income debitable to the defaulting trustees is made up. If the answer to the question is in the affirmative, the further question arises as to whether the forfeiture clause (Clause 7 of the Will) takes effect.

As regards the right of retainer the principle is well established that a defaulting trustee cannot receive his share in the trust estate until his indebtedness to the trust estate is satisfied. The theory on which the rule is based is clearly stated by Jessel, M. R. in *Jacobs* v. *Rylance* 17 Eq. 342. "In the view of this Court the trustee who is indebted to the estate.....must be taken to have paid himself all that he can claim out of the moneys which have come into his hands, and for which he has not accounted. This is not the case of impounding a trust fund. The trustee has already had all that he can claim and has paid himself." (See also *Doering* v. *Doering* 42 Ch. D. 203).

The only question therefore that need cause any difficulty is whether the forfeiture clause applies. Clause 7 of the Will reads as follows:—

> "I DECLARE that if any person who is or may become a legatee or beneficiary under this my Will shall commit, permit or suffer any act default or process whereby his or her interest or any part thereof would but for this present provision become vested in or payable to any other person or persons then such interest in so far as it is then unpaid or unsatisfied shall absolutely cease and determine as if such person were dead and in such case I DIRECT my trustees to hold such share UPON TRUST to pay or apply the income thereof or so much